

(1975) 01 PAT CK 0005
In the Patna High Court
Case No : Civil Revision No. 1550 of 1975

Setho Das and Another

APPELLANT

Vs

Paro Devi and Others

RESPONDENT

Date of Decision : 09-01-1975

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 18 Rule 3, 115, 18(3)
Constitution of India, 1950 — Article 226, 227

Citation : AIR 1975 Patna 351

Hon'ble Judges : S. Anwar Ahmad, J

Bench : Single Bench

Advocate : Binod Kumar Roy and Najmul Hoda, for the Appellant; Kameshwari Nandan Singh and Madhukar Krishna Sinha, for the Respondent

Final Decision : Dismissed

Judgement

S. Anwar Ahmad, J.—This application by the plaintiffs is directed against the order of the Court below refusing to grant them permission to reserve their right of adducing evidence in rebuttal after the defendants had closed their case.

2. The suit was filed for declaration of title and recovery of possession on the basis of a sale deed and as such it was in substance, a suit for declaration of title and recovery of possession. The Court was right in holding that in such suits it is the duty of the plaintiff to adduce evidence as the burden of proof lies upon the person who would fail if no evidence is adduced on either side (vide Section 102 of the Indian Evidence Act). Moreover, the impugned order passed by the learned Munsif cannot be said to be "a case decided" (vide Major S.S. Khanna Vs. Brig. F.J. Dillon,) within the meaning of Section 115, Code of Civil Procedure, as explained by Untwalia, J. (as he then was) in Ramgulam Choudhary and Others Vs. Nawin Choudhary and Others, . Counsel for the petitioners, Mr. Binod Kumar Roy, strongly urged that even if the case does not come within the purview of Section 115, Code of Civil Procedure, permission should be granted to him to convert this application itself into one under Articles 226 and 227 of the

Constitution of India. He relied upon the case of Rami Manprasad Gordhandas and Others Vs. Gopichand Shersing Gupta and Others, wherein their Lordships laid down that in such cases prayer should be made to the Court hearing the application to permit the party to make an appropriate change in the label of the case. Counsel for the opposite party. Mr. Kame-shwari Nandan Singh, brought to my notice the decision in the case of Shankar Ramchandra Abhyankar Vs. Krishnaji Dattatreya Bapat, wherein it was laid down that if a party had two remedies before him, he was entitled to make a choice between the two; but having chosen one of them and exhausted the same it would not be proper and sound exercise of discretion to grant relief in the other proceeding in respect of the same order of the subordinate Court What happened in that case was that a petition u/s 115, Code of Civil Procedure, was filed. This application was dismissed. Thereafter another application was filed under Articles 226 and 227 of the Constitution. The High Court in exercise of the powers conferred under Articles 226 and 227 set aside the order of the Court below. The Supreme Court, on appeal, set it aside on the ground stated above. Mr. Binod Kumar Roy, distinguished the case reported in Shankar Ramchandra Abhyankar Vs. Krishnaji Dattatreya Bapat, with the facts of the present case and submitted that it was a case where the remedy had been exhausted but in the instant case the remedy had not been exhausted and it would be a right exercise of discretion if he is permitted to convert the application into one under Articles 226 and 227 of the Constitution. I might have agreed with Counsel but for the fact that the impugned order was passed on 23-11-1973 but the prayer for its conversion into an application under Articles 226 and 227 is being made after more than one year.

Therefore, I do not think that I would be well advised to permit Counsel to convert the application into one under Articles 226 and 227 of the Constitution as such an application should be generally filed within ninety days of the order and there is no exceptional circumstance to extend the period of limitation.

3. This application accordingly fails and is dismissed, but there will be no order as to costs.